UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRANSCENDENCE TRANSIT II, INC., TRANSCENDENCE TRANSIT, INC., PATRIARCH PARTNERS, LLC, and PATRIARCH PARTNERS AGENCY SERVICES; Single or Joint Employers,	:	Case 29-CA-182049
and	:	
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO.	:	

BRIEF OF CHARGING PARTY LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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PRELIMINARY STATEMENT and STATEMENT OF THE CASE

Charging Party Local 1181-1061, Amalgamated Transit Union, AFL-CIO ("Local 1181" or "the Union"), respectfully submits this brief in support of its Exceptions to the Decision dated September 4, 2019 ("ALJD") of Administrative Law Judge Kenneth W. Chu ("the ALJ"). The ALJ recommended that the Complaint be dismissed in its entirety. The ALJ did not consider Respondents' late-filed posthearing brief in issuing his decision. See ALJD at 2 n.4.

As explained herein, the ALJ erred, among other ways, by concluding that Respondent Transcendence Transit II, Inc. ("Transcendence II") is not a successor employer to TransCare New York, Inc. ("TransCare NY"), that none of Respondents Transcendence II, Transcendence Transit, Inc. ("Transcendence"), Patriarch Partners, LLC ("Patriarch"), and Patriarch Partners Agency Services ("PPAS") (collectively, "Respondents") are a single employer or joint employers, and that Respondents did not fail and refuse to bargain collectively and in good faith with Local 1181 in violation of Section 8(a)(5) and (1) of the Act as alleged in the Amended Complaint and Notice of Hearing ("Complaint").[1]

[1]Citations herein to the ALJ's Decision are to "ALJD". Citations to the transcript of proceedings are to "Tr. __ (witness' name)". Citations to exhibits are identified by party designation ("Jt.", "GC", "CP", or "Respondents") followed by "Ex. __".

The ALJD is rife with erroneous fact findings that factor directly in the ALJ's incorrect conclusions of law. Accordingly, and unfortunately, a detailed review of the ALJD is required. Based on the actual record evidence, the Board should grant Local 1181's exceptions.

Hundreds of workers are owed wages for work performed as employees of TransCare NY and then, Local 1181 alleges, Transcendence II. Lynn Tilton ("Tilton") indirectly owned both companies. This case is part of Local 1181's effort, as the employees' exclusive collective-bargaining representative, to remedy violations of law, including by recovering the wages the employees are owed.

TransCare NY employed the workers until at least February 23, 2016,[2] and, by these workers, provided paratransit services to the public pursuant to a contract with the New York City Transit Authority ("the MTA Contract").

On February 10, Tilton, with the assistance of Patriarch (which Tilton also owned (directly or indirectly)), caused Transcendence and Transcendence II to be incorporated to continue the paratransit services and certain other business lines of TransCare NY and related companies that filed for bankruptcy pursuant to Chapter 7 of the United States Bankruptcy Code on February 24.

On February 24, but prior to TransCare NY filing for bankruptcy, PPAS, which Tilton also owned (directly or indirectly), took the MTA Contract from

[2]All dates refer to 2016 unless noted otherwise.

TransCare NY, then transferred it to Transcendence, which transferred it to Transcendence II. Respondents then continued the paratransit operations between February 24 and February 26 with the former TransCare NY employees on the same terms and conditions of employment. The record evidence shows that Transcendence II is a successor to TransCare NY, and that Respondents are a single employer and/or joint employers. Transcendence and Transcendence II likely have no assets that can satisfy any liability. See Tr. 323 (Tilton).

To the extent unpaid wages are TransCare NY's responsibility, they are the subject of claims and litigation in bankruptcy court.

This case concerns the period between February 24 and February 26. For that period, TransCare NY and Respondents each contend that the other is responsible for the unpaid wages, but no one has paid the employees.

The ALJ's errors begin with misidentifications of pertinent parties and the roles they played, even as to which there was no dispute between the parties. For example, the ALJ incorrectly identified the parties to the transaction transferring the MTA Contract. The ALJ also erred by dismissing or disregarding extensive admissions by Respondents in 2016 that Transcendence II was the employer. The ALJ also misunderstood the plain terms of the MTA Contract and contract law principles, among other errors, leading to his erroneous conclusion that the MTA

Contract was not transferred. These errors contributed directly to the ALJ's erroneous ultimate conclusions of law.

With respect to the ALJ's erroneous conclusion that Respondents are not a single employer, Local 1181 concurs in Counsel for the General Counsel's position and respectfully refers the Board to the General Counsel's brief and the select points set forth herein.[3]

QUESTIONS INVOLVED

1. Whether Transcendence II is a successor employer to TransCare NY? (Exceptions 1, 4-43, 70)

2. Whether Respondents or any of Respondents are a single employer? (Exceptions 2-3, 44-69, and the Exceptions noted above for Question 1)

ARGUMENT

I. THE ALJ INCORRECTLY IDENTIFIED IMPORTANT PARTIES AND THE ROLES THEY PERFORMED.

The ALJ incorrectly identified roles of parties as to which there was no dispute. In addition, Tilton controlled so many of the key players in this case – including all Respondents and TransCare NY – that Respondents could act and decide later on which company's behalf they claim their agents acted. Thus,

[3]Local 1181 concurs with Counsel for the General Counsel's position and does not address whether Respondents are joint employers because Respondents are a single employer.

Respondents' statements about who did what should not be accepted at face value. Determining the capacity in which a party acted sometimes requires attention to detail.

All Respondents and TransCare NY were related through Tilton at least until TransCare NY and related TransCare companies filed for bankruptcy. Tilton was, either directly or indirectly, the owner of PPAS, Transcendence, Transcendence II, and Patriarch. See Tr. 256-57, 266 (Tilton); Tr. 429-30 (Stephen). Tilton also held a majority ownership interest in TransCare Corp. through investment funds, and TransCare Corp. owned TransCare NY and other TransCare companies. See Tr. 308 (Tilton); Tr. 430 (Stephen); ALJD at 4:23-24.

Tilton also held the ultimate positions of authority with Respondents and TransCare NY (again, until it filed for bankruptcy). Among other positions Tilton held, she was the sole Director of Transcendence, Transcendence II, and TransCare NY, and the sole manager of Patriarch and PPAS. See Complaint ¶¶13(a)-(d); Answer ¶¶13(a)-(d); Tr. 256-57, 266, 267-68, 333 (Tilton).

Tilton, with Patriarch's help, caused Transcendence and Transcendence II to be incorporated on February 10. See Tr. 307 (Tilton). Transcendence II was a wholly-owned subsidiary of Transcendence. See GC Ex. 26 at 2.

The ALJD includes at least three material and inexplicable cases of mistaken identity. Most importantly, the ALJ misidentified PPAS and its attorney Randy

Creswell. These errors had at least two prejudicial effects discussed further herein. First, the ALJ perceived a critical transaction as arms'-length that, in fact, was between companies Tilton controlled, and so furthered her interests. Second, the ALJ considered party admissions by Creswell as if they were a non-party's statements.

PPAS. The ALJ incorrectly found that PPAS acted on behalf of Wells Fargo and that, in a "Bill of Sale, Agreement to Pay and Transfer Statement" ("Bill of Sale") (GC Ex. 12), PPAS, as the administrative agent of Wells Fargo, would sell some TransCare assets to Transcendence and Transcendence II. See ALJD at 5:6-7; id. at 5:36-37.

The TransCare companies had at least two sets of companies that provided them secured loans. The first pertinent lender was Wells Fargo Bank ("Wells Fargo"). Wells Fargo's loans were secured by inventory in receivables and cash. See Tr. 332. The TransCare companies were also parties to a secured loan with a group of lenders. At least most of these lenders were owned by, controlled by, or related to Tilton. See ALJD at 4 n.7; Tr. 382 (Stephen).[4]

[4]The "Bill of Sale, Agreement to Pay and Transfer Statement" (GC Ex. 12) pertaining to the transfer of former TransCare assets to Transcendence states that PPAS entered that agreement for itself and as administrative agent for "Lenders," and references a "Foreclosure Notice," which it identifies as a "Notice of Acceptance of Subject Collateral in Partial Satisfaction of Obligation" (Jt. Ex. 6). The Foreclosure Notice is signed by five companies on the foreclosing side of the transaction: PPAS and four companies that signed as "Lenders." See Jt. Ex. 6 at 3.

PPAS was the agent for the group of lenders and did not represent Wells Fargo in any capacity or action. No party contended to the contrary. See Tr. 264, 329, 330, 382-83. Wells Fargo was not a signatory on the Foreclosure Notice or the Bill of Sale. See Jt. Ex. 6; GC Ex. 12. Indeed, Wells Fargo and the group of lenders on whose behalf PPAS acted were adverse because they would have competing claims if the TransCare companies were not able to pay off their debts.

The ALJ's error is prejudicial, among other reasons, because he should have been alarmed that, as explained further herein, see infra pp. 31-32, with respect to the Foreclosure Notice and the Bill of Sale, Tilton's companies were on both sides of the transaction and in the middle. Specifically, the transaction involved TransCare (the original seller), Transcendence (the ultimate buyer), PPAS and the group of lenders (the foreclosing company and subsequent sellers), and Ark Angels (a purported financer).[5] Instead, the ALJ's mistaken belief that PPAS represented Wells Fargo signified to him that the transfer of the MTA Contract and other TransCare assets "was an arms-length transaction," see ALJD at 25:25, a

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Three of those Lenders signed by their Collateral Managers (Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC) and the fourth signed by its General Partner. The person who signed the Foreclosure Notice for all five of these companies was Tilton. See id. Tilton also signed the Bill of Sale for the same five companies. See GC Ex. 12 at 4-5.

[5]Transcendence contributed the MTA Contract to its wholly-owned subsidiary Transcendence II. See infra pp. 20, 32. Ark Angels was yet another company that Tilton owned and managed. See ALJD at 6:3.

significant factor in the ALJ's single employer analysis, see id. at 23:1 ("Single-employer status is also characterized by a lack of an arms-length relationship."). The ALJ stated:

> Other lenders were involved, including Wells Fargo, to ensure that there was proper accounting and fair value for TransCare's assets. Tilton was prepared to put up her own personal funds of $10 million to buy some of TransCare's assets. All loans and financial transactions were well documented and there was nothing suspicious, such as an interest-free loan or nonpayment of a secured interest when an installment was due, to negate anything less than an arm's-length arrangement.

Id. at 25:25-30. All of this quoted text is incorrect findings leading to incorrect conclusions of law. Wells Fargo was not a party to the transaction. No record evidence suggests that there was any accounting or good faith process to ascertain the value of TransCare's foreclosed assets, although the original contract amount for the MTA Contract in 2009 was $435 million. See id. at 4:29-32. TransCare did not receive any payment for its assets, only a $10 million credit against its loan obligations. See Jt. Ex. 6. The $10 million the ALJ referenced was a purported payment on behalf of Transcendence (as purchaser) to the lenders who foreclosed on the TransCare assets (as sellers). See GC Ex. 12. The record does not make clear if Tilton actually paid this amount.[6]

[6]The ALJ also elsewhere incorrectly stated that the consideration for the sale of TransCare's assets was $10 million paid through Ark Angels. Again, the ALJ did not cite any reason the payment was to be $10 million. See ALJD at 6:1-3.

The transfer of the MTA Contract and other TransCare assets was not what the ALJ perceived, but Tilton using Respondents to shift assets away from one group of companies she owned (including TransCare NY) so she could profit from those assets after those companies, stripped of such assets, filed for bankruptcy.

Randy Creswell and PPAS. The ALJ also misidentified PPAS' attorney, Creswell. Creswell filed pleadings and appeared in bankruptcy court on behalf of PPAS. See CP Ex. 2; GC Ex. 10 at 2. The ALJ found that Creswell represented "the secured creditor," see ALJD at 11:14, at best an ambiguous reference because of the ALJ's incorrect findings about PPAS and Wells Fargo described above. As explained herein, the ALJ appears to be referring (incorrectly) to Wells Fargo.

The ALJ also erred by finding that Salvatore LaMonica ("the Trustee" or "LaMonica"), the Chapter 7 Trustee of the TransCare companies that filed for bankruptcy on February 24, believed on February 25 "that Creswell was representing PPAS as the secured creditor" (another ambiguous and likely incorrect reference). See id. at 11:14-15. In fact, the Trustee believed on February 25 that Creswell represented the creditor that did the foreclosure, described to him at that time as Patriarch. The Trustee later learned that Creswell represented PPAS. See Tr. 116 (LaMonica).

Finally, and most importantly, in evaluating statements by Creswell on February 25 and 26 to the Trustee that Transcendence II was operating the

paratransit service under the MTA Contract since February 24 (discussed infra pp. 24-25), the ALJ incorrectly stated as follows:

> I would note as significant that Creswell did not speak on behalf of the Respondents; rather Creswell represented the interest of the secured creditors.

ALJD at 15:22-24 (emphasis supplied). As explained above, Creswell represented PPAS, a Respondent. Thus, the ALJ erred by stating that Creswell did not speak on behalf of Respondents. Moreover, since the ALJ stated that Creswell did not speak for Respondents but for the secured creditor, the ALJ confirmed that his ambiguous references to Creswell's representation of the "secured creditor" are incorrect references to Wells Fargo.[7]

The ALJ's confusion must be considered significant because the ALJ himself, in downplaying Creswell's admissions on February 25 and 26 that Transcendence II was operating the paratransit business under the MTA Contract, said it was "significant that Creswell did not speak on behalf of the Respondents; rather Creswell represented the interest of the secured creditors." ALJD at 15:22-24 (emphasis supplied). Since the ALJ deemed his erroneous finding on this point

[7]The ALJ once knew that Creswell represented PPAS. During Tilton's cross-examination, when Tilton did not agree that Creswell represented PPAS in the bankruptcy case, the ALJ suggested showing Tilton the second page of General Counsel's Exhibit 10, the transcript of a hearing in the bankruptcy case. That page lists appearances, including Creswell on behalf of PPAS and another attorney from another firm for Wells Fargo. See Tr. 303 (Tilton); GC Ex. 10 (2nd page).

"significant," it follows that he would find significant to his determination of whether Transcendence II performed the paratransit services that Creswell in fact did speak for Respondent PPAS. This is especially so because Respondents never claimed that any of them had different positions on any fact or legal issue.

Tom Charles. The ALJ mistakenly identified Tom Charles as a vice-president of TransCare NY. See id. at 10:32-33. In fact, Charles was the head of the MTA's paratransit division. See Tr. 221 (Cordiello). Charles was a party to conversations with Union representative Cordiello, see ALJD at 10:32-33, 38-40, 44-47, and communications between Patriarch and the MTA, see GC Exs. 26, 27.

II. THE ALJ ERRED BY CONCLUDING THAT TRANSCENDENCE II WAS NOT A SUCCESSOR EMPLOYER BECAUSE IT DID NOT EMPLOY THE EMPLOYEES.

The ALJ erroneously concluded that "there was no substantial continuity of operations after the takeover and Transcendence II never hired a majority of the predecessor's (TransCare NY) employees." ALJD at 14:28-29; see also id. at 16:16-17. Indeed, the ALJ concluded that Transcendence II never began operating. See id. at 14:31. Instead, the ALJ concluded that TransCare NY performed the work on the days in issue. See id. at 16:13-14.

Extensive evidence, discussed herein, demonstrates that Transcendence II continued the paratransit operations and employed the employees in issue. Most importantly, between February 24 and February 26, and in the early stages of the

bankruptcy, Respondents told the Union, the employees in question, the New York City Transit Authority ("MTA"), and the Bankruptcy Court that Transcendence II (sometimes referred to by Respondents as "NewCo") was the employer of the employees in question. In the same period, Respondents also told the MTA, the Bankruptcy Court, and the Trustee that Transcendence II was providing or provided the paratransit services covered by the MTA Contract and that Respondents acquired the assets necessary to provide those services.

In contrast, the Trustee during this period understood that the paratransit operations were not part of the bankruptcy because of the foreclosure. Thus, there is no evidence that the Trustee communicated with anyone as the employer of the employees in question or claimed at any time to be the employer or providing the paratransit services. The Trustee did not direct any of the employees to continue working or in any other way. See Tr. 146 (LaMonica). He did not tell the drivers to return the buses. See Tr. 123, 141, 148 (LaMonica).

In these circumstances, the record evidence establishes that Transcendence II continued the paratransit operations and employed the employees in question between February 24 and February 26.

A. Respondents told the Union that Transcendence II was the employer.

Respondents told the Union and the employees about the change of employer from TransCare NY to Transcendence II on February 24, and confirmed

the change by a written communication to the employees on February 26, discussed infra p. 17.

On February 24, TransCare NY Vice President Thomas Fuchs sent an email to Anthony Cordiello, the Union representative responsible for TransCare NY's bargaining unit employees. The subject line of Fuchs' email read: "NewcoAnnouncement22316." Fuchs attached to the email a memo titled "TransCare Employee Announcement – 2.23.2016" (the "NewCo Announcement"). In the email, Fuchs told Cordiello that the NewCo Announcement was sent to all employees. See GC Ex. 23 at 1.

The NewCo Announcement Fuchs sent to Cordiello and all employees informed employees that they were now employed by Transcendence II, with no change in the terms and conditions of their employment:

> We are pleased to say we have accomplished setting up and capitalizing the separated paratransit entity which will now be called Transcendence Transit II, Inc. This changes nothing for our transit employees except that their employment is being transferred to this new entity – same jobs, same compensation, same benefits.

Id. at 3 (emphasis supplied).

Fuchs' email to Cordiello followed a telephone conversation they had in which Fuchs informed Cordiello about the change in employer and that everything else will remain the same. See Tr. 217-18 (Cordiello).

Fuchs issued the NewCo Announcement for Respondents. This is apparent from the following facts:

- On February 24, Randy Jones, Managing Director of Patriarch, asked Fuchs to send the NewCo Announcement. See GC Ex. 29.
- Lynn Tilton reviewed the NewCo Announcement before Jones asked Fuchs to send it. See Tr. 457-58 (Jones).
- Fuchs would have run the paratransit business for Transcendence II. See Tr. 284-85 (Tilton).
- Only Respondents, and not TransCare NY, benefitted from the NewCo Announcement.[8]

On February 25, Cordiello and John Deloatch, another Union representative, went to the property and, based on Fuchs' communications, assured employees that everything would be the same (except the employer). See Tr. 221-23 (Cordiello).

Respondents induced bargaining unit employees, who TransCare NY owed pay for prior weeks, see Tr. 226 (Cordiello), to work for Transcendence II by telling the Union and the employees that Transcendence II was capitalized and the terms and conditions of the employees' employment would not change. Respondents' concern that employees would stop working because they were not being paid is evident from Respondents' further announcement that they would pay Transcendence II employees who continued to work as scheduled certain back

[8]Fuchs also sent the February 26 written communication to employees under circumstances that make apparent that he sent both announcements for Respondents. See infra p. 18.

wages if the bankruptcy estate does not pay them. See GC Exs. 30, 15; see also Tr. 351 (Tilton) (discussing proposal to pay employees so they would not "run out the door"); Tr. 406-07 (Stephen) (proposal to pay was to induce employees to work for the new company); see also Tr. 423 (Stephen) (Respondents set a deadline for the MTA to meet their conditions because they feared that employees would scatter).

The ALJ incorrectly found that Transcendence II did not cover payroll for wages owed by TransCare NY because the Trustee refused to allow Transcendence II to use the TransCare NY payroll records and system. See ALJD at 13:5-11. Respondents could have found another way to pay the employees but, once Respondents knew that the MTA would not continue with Transcendence II, Respondents' reason for proposing to pay no longer applied.

The ALJ stated that Cordiello testified that Fuchs told Cordiello on February 24 that the job offers had not yet transferred to Transcendence II. See id. at 17:2-3. Elsewhere, the ALJ stated that Fuchs told Cordiello on February 24 that some employees would be transferred to the new company. See id. at 10:36-37 (emphasis supplied). Upon a review of the record, we have not identified any basis for these statements by the ALJ, which are inconsistent with Cordiello's testimony and the NewCo Announcement. See Tr. 215-220 (Cordiello).[9]

[9]The ALJ also stated that Cordiello (or possibly Fuchs, the ALJ's sentence at page 17 of the ALJD is ambiguous) was informed on February 26 that TransCare NY was closing its operations. See ALJD at 17:3-4. Cordiello actually testified

Thus, under the circumstances present in this case, Respondents' communications to the Union, as the employees' bargaining representative, are themselves sufficient grounds for the Union, the employees, and now the Board to accept Respondents' representation that bargaining unit employees' employment was transferred to Transcendence II on February 24.

B. Respondents told employees that Transcendence II was their employer and communicated with employees as their employer.

As stated above, Fuchs' February 24 email to Cordiello stated that the NewCo Announcement was sent to all employees. See GC Ex. 23.

Drivers Shunda Watson and Marianne Insogno received copies of the NewCo Announcement. Copies were available to drivers in the push-out/cash-out area. See Tr. 21-24 (Watson); Tr. 81 (Insogno).

On February 26, TransCare NY non-unit employee Alejandrina Cleary received a letter on Transcendence II letterhead signed by Glen Youngblood, President, and dated February 24. The letter stated that, effective February 24, Cleary's employment was transferred to Transcendence II and that she would have

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that Charles from the MTA told him on February 26 that Transcendence is out of business. See id. at 10:44-45; Tr. 223 (Cordiello). Cordiello then told Fuchs. See Tr. 224 (Cordiello). Based on his misunderstandings of Cordiello's testimony, the ALJ found that Fuchs believed that TransCare NY was still operating until the afternoon of February 26. See ALJD at 17:3-6. Since the ALJ misunderstood Cordiello's testimony, Fuchs did not testify, and Fuchs sent another announcement on February 26 addressed specifically to NewCo employees (without consulting with the Trustee) (discussed infra pp. 17-18), the ALJ's finding is baseless.

the same duties, responsibilities, compensation, and benefits. Cleary was not at work on February 24 or 25, which likely delayed her receipt of this letter. See Tr. 46-47 (Cleary); GC Ex. 3.

In the late afternoon on February 26, Jones requested that Fuchs send another announcement directed to "NewCo Employees ONLY:" ("the Second NewCo Announcement"). See GC Exs. 4, 6, 28; see also GC Ex. 35 (Tilton Deposition Transcript) at 123-24. The Second NewCo Announcement informed Transcendence II employees that, among other things, "we must cease our operations immediately." See GC Exs. 4, 6, 28. Tilton approved and authorized the Second NewCo Announcement before Fuchs sent it. See GC Ex. 35 (Tilton Deposition Transcript) at 124-26.

The Second NewCo Announcement confirms that Transcendence II had already become the employer because it was directed to "NewCo Employees ONLY:" and confirms that Transcendence II operated by the statement "we must cease our operations immediately."

Insogno saw the Second NewCo Announcement on a screen like a television in the cash-out area. See Tr. 92-94 (Insogno). Cleary showed the Second NewCo Announcement to Local 1181 shop steward Karen Dockery, see Tr. 65 (Dockery), and other drivers, see Tr. 51-52 (Cleary); Tr. 69-70 (Dockery).

Fuchs issued the Second NewCo Announcement for Respondents. This is apparent, again, from the following facts:

- The Second NewCo Announcement was directed to "NewCo Employees ONLY:".
- Jones requested that Fuchs send the Second NewCo Announcement.
- Tilton approved and authorized the Second NewCo Announcement before Fuchs sent it.
- There is no evidence that Tilton, Jones, or Fuchs sought or received direction from the Trustee before Fuchs sent the Second NewCo Announcement on February 26.
- Only Respondents, and not TransCare NY, benefitted from the Second NewCo Announcement.

The ALJ dismissed the first NewCo Announcement as a draft, not an offer of employment, and a leaked announcement in anticipation of transfers that never occurred. See ALJD at 16:16-31; id. at 8:8-19. According to the ALJ, none of the employees should have understood from the NewCo Announcement that they were working for Transcendence II on February 24, 25, and 26. See id. at 16:33-35. These findings make no sense. The NewCo Announcement Fuchs emailed to Cordiello did not state that it was a draft, and Fuchs stated that the Announcement went to all employees. See GC Ex. 23. The NewCo Announcement Watson saw also did not say it was a draft. See GC Ex. 2. The NewCo Announcement stated that "employment is being transferred to this new entity." See GC Exs. 2, 23. The Announcement references a forthcoming new employment letter, but does not

suggest that the transfer is contingent on that letter. The letter non-union employee Cleary received from Transcendence II stated that the transfer was effective on February 24. See GC Ex. 3. Respondents intended for the Union and employees to rely on the representations in the NewCo Announcement so the employees would continue to perform their jobs for Transcendence II, which they did.

If the NewCo Announcement had been sent in error, it would have been retracted. Instead, it was followed by the Second NewCo Announcement, directed to "NewCo Employees," thus removing any reasonable doubt that the employment transfer occurred. Moreover, the copies of the NewCo Announcement that include the word "draft" are attached to emails calling for the Announcement to be distributed. Jones' email to Fuchs says, in pertinent part, "Here is the announcement. Please distribute to your employees on the MTA business." See GC Ex. 29 (emphasis supplied). Jones' email to Youngblood calls for the employee mailings to go out as soon as possible. See GC Ex. 13.[10]

C. Respondents told the MTA that Transcendence II was the employer. Respondents also told the MTA that Transcendence II was providing the paratransit services covered by the MTA Contract and held the assets necessary to operate under the MTA Contract.

On February 25, Brian Stephen, an attorney with Patriarch, sent an email to Charles, the head of the MTA's paratransit division, see Tr. 221 (Cordiello), and

[10]Jones' email to Youngblood concerns non-bargaining unit employees. See ALJD at 7:44-8:3 (Fuchs communicated with the paratransit employees).

Diane Morgenroth, an attorney with the MTA. Stephen sent the email to help Respondents secure the MTA's consent to Transcendence II providing the paratransit services the MTA Contract covered. See Tr. 399-400, 433 (Stephen). Stephen identified himself in the email as an attorney with Patriarch, his signature block identifies him as "Senior Director, Legal" with Patriarch, and he sent the email from his PatriarchPartners.com email address. See GC Ex. 26 at 2-3.

Stephen's email described pertinent events and their implications in a manner largely consistent with Local 1181's understanding and contrary to the ALJ's findings.

First, Stephen explained that, on February 24, lenders foreclosed on the MTA Contract, among other TransCare assets. The lenders then sold the MTA Contract and other assets to Transcendence, and Transcendence "contributed the Agreement to its wholly-owned subsidiary Transcendence Transit II, Inc." Id. at 2.

Stephen also explained that, as of February 24, Transcendence II employed the drivers and other employees providing the paratransit services:

> All of the 390 drivers and other TransCare [NY] employees necessary for Transcendence Transit II to continue to provide service under the Agreement were transferred to Transcendence Transit II at the time of the foreclosure and are now employees of Transcendence Transit II . . .

Id. (emphasis supplied).[11]

[11]Stephen admitted during his testimony that TransCare NY ceased operations on February 24, before backtracking by saying that he does not know if

Addressing the bankruptcy and the status of the employees, Stephen stated:

> TransCare filed for bankruptcy protection under Chapter 7 of the U.S. Bankruptcy Code on the evening of February 24th and ***after*** the foreclosure. The bankruptcy trustee does not have the power and authority to unwind the foreclosure – nor has he expressed any misgivings or concerns about the foreclosure. In point of fact, it is much better for the bankruptcy trustee and for TransCare's bankruptcy estate that the Agreement and the employees associated with it have been moved and are no longer TransCare's responsibility.

GC Ex. 26 at 3 (emphasis in original); see also Tr. 437 (Stephen) (MTA Contract was not part of the Debtors' bankruptcy estates).[12]

The ALJ also erred by finding that Stephen never stated that Transcendence II was operating in an email Stephen sent to Morgenroth on February 26 at 2:09 p.m. See ALJD at 15:10-14. Stephen sent this email at Tilton's request. See Tr. 435 (Stephen). Stephen stated therein that he "spoke with his principle" [sic], GC Ex. 27 at 1, and that unless the MTA provides certain assurances, "we will, unfortunately, be forced to discontinue service at 5:00 today." Id. at 2. The necessary implication of Stephen's statement that "we" will be forced to "discontinue" service is that Transcendence II was at the time providing the

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TransCare NY did business after filing for bankruptcy on February 24. See Tr. 379, 380 (Stephen).

[12]The ALJ erred by stating that Stephen testified that he wanted to assure the MTA that the lenders would not have a right to foreclose on the contract. See ALJD at 12:42-43. In fact, Stephen was assuring the MTA that the lenders had the right to foreclose on the contract and that the Trustee could not "unwind" the foreclosure. See GC Ex. 26 at 2, 3; Tr. at 400 (Stephen).

paratransit services. Stephen testified that he was speaking for Transcendence, see Tr. 435, and, on February 26, if TransCare NY was still providing the service, only the Trustee (not Stephen's principal) could have decided to discontinue the service.

On February 26, at 3:04 p.m., Jones forwarded Stephen's February 26 email to Charles. See GC Ex 27 at 1. At 3:33 p.m., Charles replied to Jones by email and stated that the MTA could not move forward. See id.[13] At 5:31 p.m., Jones emailed Fuchs the Second NewCo Announcement for forwarding to employees. See GC Ex. 28. At 5:58 p.m., Fuchs emailed the employees the Second NewCo Announcement. See GC Ex. 4.

The MTA did not contest Respondents' assertions that Transcendence II was providing the paratransit services covered by the MTA Contract.

D. Respondents told the Bankruptcy Court that Transcendence II was the employer. Respondents also told the Bankruptcy Court that Transcendence II provided the paratransit services covered by the MTA Contract and held the assets necessary to operate under the MTA Contract.

On February 29, PPAS, by its counsel Randy Creswell, submitted to the Bankruptcy Court a response to a motion by the Trustee. PPAS stated therein:

> Thereafter, from the Petition Date through and beyond the close of business on Friday, February 26, PPAS sought to work and coordinate with the Metropolitan Transit Authority for the City of New York, the Trustee and his counsel, and the former employees of certain of

[13]At about the same time, Charles informed Cordiello that Transcendence II is out of business and the MTA would be securing its vehicles. See Tr. 223-24 (Cordiello).

> Debtors' prepetition businesses, for the continuation of paratransit and other services formerly provided by Debtors prior to the Petition Date.

See CP Ex. 2 ¶8 (emphasis supplied). Again, the necessary implication of PPAS' reference to "former" employees is that they ceased to be TransCare NY employees on or before the bankruptcy Petition date (also the date of the strict foreclosure). Similarly, the necessary implication of PPAS' reference to services "formerly" provided by Debtors is that TransCare NY ceased providing paratransit services on or before the bankruptcy Petition date.

Respondents also admitted that Transcendence II provided the paratransit services in a Stipulation entered by PPAS, Transcendence, and the Trustee on or around March 10 in the bankruptcy case:

> [T]wo days after the Petition Date, on or about February 26, 2016, Transcendence ceased operating and, to the best of PPAS' knowledge and belief, the Foreclosed Personal Property Assets have been secured.")[.]

CP Ex. 1 at 3 (emphasis supplied).

The Stipulation also confirms that Respondents asserted that they held the assets necessary to operate under the MTA Contract:

> WHEREAS, PPAS and Lenders maintain and assert that the Strict Foreclosure was properly conducted in accordance with applicable law, title in the Foreclosed Personal Property Assets passed by operation of law immediately and prepetition, and therefore neither the Foreclosed Personal Property Assets nor the Non-Debtor CONs are property of the Debtors' estates[.]

Id.

> WHEREAS, prior to the Petition Date, Patriarch Partners Agency Services, LLC ("PPAS"), acting as the administrative agent for various pre-Petition Date secured lenders of Debtors (collectively, the "Lenders"), has maintained that it conducted a strict foreclosure, pursuant to § 9-620 of the New York Uniform Commercial Code, of the Lenders' interests in, inter alia, certain of Debtors' personal property, including equipment, inventory, vehicles, and certain contracts (collectively, the "Foreclosed Personal Property Assets"), in partial satisfaction of Debtors' financial obligations to the Lenders (the "Strict Foreclosure")[.]
>
> WHEREAS, PPAS asserts that prior to the Petition Date, the Foreclosed Personal Property Assets and the Non-Debtor CONs were transferred, sold, and/or assigned to Transcendence Transit, Inc. ("Transcendence")[.]

Id.

E. Respondents told the Trustee that Transcendence II was providing the paratransit services covered by the MTA Contract and held the assets necessary to operate under the MTA Contract.

On February 26, Creswell sent an email to the Trustee and Gary Herbst, one of the Trustee's attorneys, which begins,

> Gary – further to our conversation just now, as we discussed, Transcendance [sic] Transit II has been providing services under the MTA contract above since the filing date.

GC Ex. 9 at 2 (emphasis supplied).

The Trustee was informed on February 25 that Patriarch conducted a strict foreclosure of various assets of TransCare prior to the filing of the bankruptcy petition. He later learned that PPAS conducted the foreclosure. Creswell told the Trustee that the assets necessary to provide the paratransit services were not assets

of the bankruptcy estate and that a new entity was operating the paratransit business. Based on this information, the Trustee understood that the paratransit operations were not his responsibility. See Tr. 115-16, 118-19, 141 (LaMonica).

There is no record evidence that the Trustee contested Respondents' assertions that Transcendence II was providing the paratransit services.

Consistent with these facts, the Trustee only sought for the MTA to pay TransCare NY, and the MTA only paid TransCare NY, for paratransit services provided pre-petition. Wells Fargo, as TransCare NY's lender with a secured interest in TransCare NY's accounts receivable, joined in the agreement between the Trustee and the MTA. See Tr. 489-90 (LaMonica); GC Ex. 33 (Stipulation) at 3-4 ¶N (defining "NYCTA Claims" as "claims related to the services provided by the Debtors to NYCTA prior to the Petition Date") (emphasis supplied); id. at 4 ¶1 ("NYCTA shall pay to the Trustee, on behalf of the TransCare New York estate, the total settlement amount . . . in full and final satisfaction of all amounts owed to the Debtors' estates or Wells Fargo in connection with the NYCTA Claims."); id. (Order Approving Stipulation).

The ALJ found that, after Creswell told the Trustee on February 26 that it did not appear that Respondents and the MTA would reach an agreement for Transcendence II to continue to perform the paratransit services, and after Fuchs told the Trustee that he was leaving the facility, the Trustee contacted the MTA

and "instructed that the busses [sic] be returned to the Foster Avenue facility and that the MTA should secure the vehicles." ALJD at 12:7-15. The Trustee did not "instruct" the MTA; he called the MTA's attorney to advise that the MTA's buses are returning to the facility but no one is there from the secured creditor's side and the MTA should secure its buses. See Tr. 122 (LaMonica).

F. Respondents' witnesses' 2019 explanations for why Transcendence II was not the employer are *post hoc* fabrications.

Examining Respondents' motive for pertinent actions helps reveal Respondents' proffered explanations of why they were not the employer to be post hoc fabrications. Respondents communicated and acted in 2016 as described above, consistent with their plan to keep the MTA Contract under their control and to hire TransCare's workforce, for a simple reason: to make money. The MTA Contract was lucrative and at least potentially profitable. See GC Ex. 34 (Tilton Deposition Transcript) at 154 (MTA Contract "was the entity that was creating the most positive cash flow"); id. at 155 ("Its value was it was the only thing that provided the cash flow to keep the rest of the company alive."); Tr. 381 (Stephen) (Tilton came up with a plan to save profitable divisions of TransCare Corp., including the MTA Contract); Tr. 421 (Stephen) (cash flow of paratransit business supported other TransCare businesses); Tr. 428 (Stephen) (MTA Contract was viewed as potentially profitable). Tilton only tried to save TransCare jobs when they were part of operations that would yield her profit.

The ALJ stated that "[w]ithout revenue generated from the contract, it would make little business sense for Transcendence II to operate when it cannot pay employees and expenses." ALJD at 15:40-42. But Respondents' best hope of persuading the MTA not to transfer the paratransit work to other companies was to foreclose on the MTA Contract and perform the work without interruption. That is to say, Respondents' longer-term interest was best served by operating until the MTA decided how it wanted to proceed, even if Respondents risked that the MTA would not pay for services Respondents provided for a few days. See id. at 12:45-47 (Stephen "believed it would [be] easier to have the contract assigned to Transcendence II if it was seen by the MTA that the company was a going concern. (Tr. 401, 434)"). To operate, Transcendence II hired TransCare NY's employees without any changes in their jobs, compensation, or benefits.

Now that Respondents can not derive any revenue from the MTA Contract but may be liable for violating the Act, Respondents deny that Transcendence II was the employer of the employees and provided the paratransit services.

Should the Board determine that any issues genuinely turn on witnesses' credibility, Respondents' representatives' testimony should not be credited. For example, Stephen testified that he knowingly made false statements to the MTA. See Tr. 432-34 (Stephen). Since Stephen claims he made false statements to a

government entity to benefit Respondents, his attempt to rewrite history to help Respondents in this government (NLRB) proceeding should not be credited.

Tilton disputed stipulations her companies entered and submitted to the Bankruptcy Court, see Tr. 311-16 (Tilton), and did not agree that Creswell represented PPAS in the bankruptcy case even after she was shown a pleading demonstrating that he did. See Tr. 300, 303 (Tilton); GC Ex. 10 at 2 (listing appearances of counsel). Each time Tilton so testified, she was trying to undermine evidence that is contrary to Respondents' positions in this case.

Jones' testimony supports the General Counsel's and the Union's positions for a different reason: he did not address the written communications to which he was a party commencing in the afternoon of February 24 and continuing to February 26. See, e.g., GC Exs. 26, 27, 28, 29. Thus, Jones did not rebut the contents of written communications that show that the employees in issue were employees of Transcendence II between February 24 and February 26.[14]

Respondents also did not have Creswell testify about his statements that Transcendence II was the employer and operated.

[14]Morgenroth copied Jones on her February 25 response to Stephen's February 25 email. See GC Ex. 26 at 1. That the exhibit includes Stephen's February 25 email shows that Morgenroth sent that email to Jones with her response. See GC Ex. 26. Jones did not dispute the statements in Stephen's email that Stephen now says were false.

For these reasons, the ALJ erred when he concluded that there was no substantial continuity of operations, that Transcendence II did not hire a majority of the employees in question, and that, therefore, Transcendence II was not a successor employer.

III. THE ALJ ERRED BY CONCLUDING THAT TRANSCENDENCE II WAS NOT A SUCCESSOR EMPLOYER BECAUSE IT COULD NOT HAVE OPERATED BECAUSE IT DID NOT RECEIVE NECESSARY ASSETS.

The ALJ excused, set aside, or ignored all of Respondents' admissions from February 2016 that they performed the paratransit services and, instead, focused on Respondents' claims that they did not receive assets purportedly necessary to performing those services. Central to the ALJ's reasoning is the status of the MTA Contract. The ALJ acknowledged that Tilton had Patriarch employees create Transcendence II to perform the paratransit services previously performed by TransCare NY and take various steps to prepare Transcendence II to operate. See ALJD at 14:32-38; id. at 5:26-28; id. at 6:15-20. Yet according to the ALJ:

- "Transcendence II could not operate a para-transit business unless it was under contract with the MTA." Id. at 15:39-40.
- "Tilton was unable to secure the assignment of the MTA contract for Transcendence II and the foreclosure sale and transfer of [TransCare] assets never went through." Id. at 6:30-31.
- "According to Stephen . . . the assignment of the MTA Contract to Transcendence II never occurred. Instead, TransCare filed for bankruptcy on February 24." Id. at 6:33-35 (citations omitted).

- The Trustee still held the MTA Contract as a TransCare NY asset. See id. at 15:25-26.

As Local 1181 explained in its post-hearing brief, which the ALJ ignored,[15] Respondents foreclosed on the MTA Contract on February 24 so it was then no longer an asset of TransCare NY. But the Board does not need to resolve the status of the MTA Contract because a company does not need title to a business or customers to be an employer. More specifically, Respondents' purported failure to become a party to the MTA Contract is no impediment to finding that Respondents operated the paratransit business and employed the employees between February 24 and 26, and to holding that Respondents violated the employees' rights under the Act. Thus, the ALJ was again incorrect in multiple respects.

As also explained herein, the ALJ erred for similar reasons with respect to a computer server.

A. The MTA Contract became Respondents' asset on February 24.

On February 24, TransCare NY filed for bankruptcy. If the MTA Contract had remained with TransCare NY, the Trustee, in the ordinary course, would have terminated the paratransit operations promptly upon his appointment. See Tr. 129 (LaMonica) ("Generally, the first thing a chapter 7 trustee does is change the locks

[15]The ALJD includes a note that the ALJ could not find the correct cite for Sprain Brook Manor Rehab., another case in which he was the ALJ. See id. at 21:46-47. Local 1181's post-hearing brief included the correct cite: 365 NLRB No. 45 (2017).

and close it down . . ."). However, Tilton knew that the paratransit operation was lucrative and at least potentially profitable. See supra p. 26. To preserve this lucrative business line, Tilton, with Patriarch's help, devised a plan to continue to control the MTA business by causing PPAS to foreclose on the necessary assets, including the MTA Contract, prior to TransCare NY filing for bankruptcy, thereby avoiding the MTA Contract becoming an asset of TransCare NY in the bankruptcy. See, e.g., ALJD at 5:21-22; Tr. 381 (Stephen) (Tilton came up with a plan to save profitable divisions of TransCare Corp., including the MTA Contract).[16]

Tilton's plan involved two steps (which, because of her control of all involved parties, happened essentially simultaneously). First, on February 24, but before the TransCare companies filed for bankruptcy on that day, PPAS, on behalf of the lenders it represented, foreclosed on the MTA Contract and other TransCare assets. This part of the "transaction," which the ALJ referred to as a foreclosure sale, is memorialized in two documents comprising Joint Exhibit 6. The first document is a Notice of Default and Acceleration, sent on Patriarch letterhead, addressed to TransCare Corp., and signed by Tilton for PPAS and four lenders. The second document is a Notice of Acceptance of Subject Collateral in Partial

[16]The ALJ erred by stating that TransCare filed for bankruptcy because of the purported failure to transfer the MTA Contract and other TransCare assets. See ALJD at 6:35. Tilton's plan was for the TransCare companies to file for bankruptcy but to keep certain desired assets out of the bankruptcy through the foreclosure. See, e.g., id. at 5:19-23, 29-31.

Satisfaction of Obligation, sent on PPAS letterhead, signed by Tilton for the same companies, and signed by the Chief Operating Officer of fourteen TransCare companies, including TransCare NY. Thus, both documents appear to have been prepared by Patriarch employees.

Next, the lenders "sold" the MTA Contract and other assets to Transcendence, and Transcendence then contributed the MTA Contract to its wholly-owned subsidiary Transcendence II. See GC Ex. 26 at 2. The sale to Transcendence was memorialized in the Bill of Sale discussed above. See GC Ex. 12. That PPAS and Transcendence transferred the MTA Contract shows that Respondents understood that it was their asset to transfer.[17]

The ALJ conceded that the documents governing the transfer were executed on February 24. See ALJD at 15:2-3.[18] However, the ALJ concluded that the MTA Contract remained with TransCare NY because the MTA Contract provides that it can not be transferred without the MTA's consent and the MTA did not consent. See id. at 6:26-31. The ALJ also stated that the MTA Contract and a

[17]The ALJ sometimes conflated the two steps. For example, he stated that the Bill of Sale involved the sale of TransCare assets and the purchase of TransCare operations. See ALJD 5:36-39. Since no TransCare company is a party to the Bill of Sale, the ALJ was referring to foreclosed TransCare assets and operations.

[18]The ALJ inexplicably made this correct statement immediately after incorrectly stating that the parties never executed the Bill of Sale. See id. at 14:46-47.

computer server could not be transferred without the Trustee's consent. See id. at 15:4-5. The ALJ then "credit[ed]" Tilton's legal assertion that the absence of these consents caused the agreement to be null and void:

> I credit the testimony of Tilton when she credibly summarized the current situation. She stated that TransCare assets were never transferred, sold and/or assigned to Transcendence II (Tr.313; CP Exh. 1):
>
> > It was PPAS's assertion that it had signed the documents. The assets were never delivered. So yes, it – we – there was an assertion that we should have had those assets delivered to us, and they were not. The documents were signed, but as in any agreement, if someone violates or breeches [sic] that agreement, that agreement is null and void. TransCare, nor its subsidiaries, ever delivered those assets because the trustee got involved and stopped the delivery.

Id. at 15:28-37.

Tilton and the ALJ were incorrect. As an initial matter, Tilton's testimony stated a legal conclusion. That the ALJ agreed with Tilton does not convert the ALJ's legal conclusion to a fact finding or a matter of credibility.

Assuming that the TransCare companies failed to "deliver" the foreclosed assets, including the MTA Contract, a breach of contract typically does not render the contract null and void but subjects the breaching party to damages and potentially other remedies. Neither the ALJ nor Tilton explained why a breach by the TransCare companies rendered any agreement null and void. Nor did they cite any legal authority supporting their position. See id. at 15:28-37. Indeed, even

Stephen testified that the MTA Contract was not part of the Debtors' bankruptcy estates. See Tr. 437 (Stephen).

Similarly, the MTA's decision not to consent to the transfer did not mean that the MTA Contract remained with TransCare NY. The ALJ referenced the section of the MTA Contract that states that TransCare NY may not transfer it without the MTA's prior consent. See ALJD at 6:26-28. However, the ALJ failed to recognize that the same section does not deem a transfer to which the MTA has not consented void, but instead a material breach of the Contract. Specifically, Article 204 of the MTA Contract provides:

> The Contractor shall not subcontract, assign, transfer, convey, sublet or otherwise dispose of this Contract or its right, title or interest in or to the same or any part thereof without the prior written consent of the Authority. A violation of this provision shall be deemed to be a material breach of the Contract.

Jt. Ex. 7 (Article 204) (emphasis supplied).

According to Article 208(A) of the MTA Contract, a material breach means that the contractor is in default:

> The Contractor shall be in default if it commits a breach of the Contract deemed material by the Authority. Without limiting the generality of the foregoing and in addition to those instances specifically referred to in the Contract, the Contractor shall be in such default if: . . . (iii) it assigns or subcontracts the Work other than as provided in the Contract.

Id. (Article 208(A)).

The MTA Contract also provides in Article 208(B) and (C) remedies for a contractor default, and in Article 208(D) that the MTA may waive a default. See id. (Article 208(B), (C), (D)). Remedies for a default include, but are not limited to, that the contractor shall cease performance of the work, the MTA may take any action necessary to complete the work, and the MTA may bring an action to recover damages. Nothing in the MTA Contract deems a transfer to which the MTA has not consented void. See id. (Article 208(B), (C)).

Thus, under the plain terms of the MTA Contract, that the MTA may not have consented to the transfers of the MTA Contract does not mean that it remained with TransCare NY. Respondents' transfers of the MTA Contract were material breaches of the MTA Contract, but did not void the foreclosure or subsequent transfers of the MTA Contract.

Although Respondents held the MTA Contract, under Article 208 the MTA could require Respondents to cease work, refrain from assigning Respondents routes, and repossess its vehicles. The MTA had to decide whether to invoke these remedies. Indeed, the MTA knew by February 24 about Respondents' actions[19] and, understandably, did not immediately curtail critical paratransit services but acted reasonably promptly after assessing the situation. Respondents attempted to

[19]Charles was already aware of the transfer of the business when Cordiello spoke to Charles on February 24. See Tr. 220-21 (Cordiello).

reach an agreement with the MTA between February 24 and February 26 so that they could gain the benefit of the MTA Contract and, to that end, Respondents continued the paratransit services TransCare NY previously provided in the same manner with the same employees and the same terms and conditions of employment. When Respondents learned on February 26 that they would not benefit from the MTA Contract, they ceased operating.

With respect to the Trustee's purported failure to consent to the transfer or termination of the MTA Contract, Respondents effected the initial transfer on February 24 before the bankruptcy was filed and before the Trustee was appointed. Thus, the Trustee's consent was not required and the ALJ did not explain how the Trustee interfered with the transfer of the MTA Contract. Indeed, as late as the night of February 25, Patriarch, by Stephen, told the MTA that the Trustee was not objecting to the foreclosure. See GC Ex. 26 at 3; Tr. 398 (Stephen).

The ALJ stated that Patriarch needed the Trustee's consent to terminate the MTA Contract, but offered no authority for this assertion. See ALJD at 15:47-16:3. To the extent Patriarch pursued termination of the MTA Contract and negotiation of a new contract with the MTA as an alternative to securing the MTA's consent to transfer of the MTA Contract, one may speculate that the Trustee's consent may have facilitated the MTA's agreement, but this does not change that the MTA Contract was already transferred as explained in this section.

See GC Ex. 9 at 2 ("We have no assurances from MTA that a new contract is definite"). In any event, Respondents did not request such consent from the Trustee until 2:00 p.m. on February 26. See GC Ex. 9. The Trustee attempted to respond promptly, but Creswell was not available.[20] The Trustee consented the same afternoon, but after the MTA told Respondents that it would not move forward with Transcendence II. See GC Exs. 9, 27; ALJD at 16:3-6.

That Respondents could foreclose on the MTA Contract but not benefit from it is not an unusual result. Any time a lender accepts a security interest in collateral in connection with a loan, the lender assumes a risk that, upon default by the borrower, the lender will not be able to benefit from the collateral. For example, a party that takes a security interest in a vehicle may risk that the vehicle will be lost, stolen, damaged, or destroyed, or that another party has or obtains a greater claim to the vehicle. In this case, PPAS took the MTA Contract and other assets upon TransCare's default, but PPAS and the Transcendence companies (as subsequent transferees) could not benefit from the MTA Contract without the MTA's consent, which they were unable to secure.

[20]The ALJ, citing to General Counsel Exhibit 9, stated that Creswell asked the Trustee several times whether he would approve the termination of the MTA Contract. See ALJD at 11:38–12:7. The ALJ omitted that the Trustee's response, contained within the same Exhibit, and the Trustee's testimony reflected that the Trustee tried to call Creswell several times that same afternoon and that Creswell ultimately responded that he was in security at JFK Airport. See GC Ex. 9; see also Tr. 154-55 (LaMonica).

In sum, as a matter of law, the foreclosure and transfer of the MTA Contract did not fail or become void because the MTA or the Trustee did not consent to the transfer. Instead, Respondents' inability to benefit from the foreclosure and transfer was a risk Respondents assumed when they took the MTA Contract from TransCare NY prior to securing the MTA's consent. For these reasons, the premise of the ALJ's conclusion that Respondents could not have been the employer of the employees in issue (or incurred any obligations to them under the Act) – i.e., that Respondents were not parties to the MTA Contract – is incorrect.

B. Respondents did not need legal title to the paratransit business or party status to the MTA Contract to operate the paratransit business and become the employer between February 24 and 26.

The ALJ also erred when he concluded that Respondents could not operate the paratransit business or employ the workers in question. The existence of an employment relationship does not depend on whether the alleged employer is authorized to operate a business, owns a business, or secures a contract with a customer. For example, companies at times conduct business that they are not authorized to conduct. A company may conduct such unauthorized business willfully or negligently (mistakenly believing that it has authority). The legal term for acting beyond one's legal power or authority is "ultra vires." When a company employs people to perform business that it is not authorized to conduct and the employees work, the company owes the employees their wages. That the company

did not have authority to conduct the business is not a basis for the company to evade its obligations to its employees.

From February 24 to February 26, Respondents provided the paratransit services formerly provided by TransCare NY and employed TransCare NY's former employees, who performed the work. See Point II. Thus, Respondents were obligated to pay the employees and bargain with the Union regardless of whether the MTA authorized Respondents to provide the paratransit services.[21]

Similarly, under Board law, ownership is not required for a company to be a successor employer.[22] "That is so because the successorship doctrine exists not as a mere consequence or incident of ownership interest. Rather, that doctrine

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[21]As perfectly clear successors, Respondents had an obligation to bargain with Local 1181 before changing terms and conditions of unit employees' employment. Respondents' failure to pay their employees was a unilateral change in terms and conditions of employment that violated Section 8(a)(1) and (5) of the Act. Failures to pay wages and other types of compensation in circumstances where the Act requires employers to maintain the status quo were held to be violations of Section 8(a)(1) and (5) in LM Waste Service Corp., 360 NLRB No. 105, slip op. at 4-5, 7, 9-10, 11 (2015) (failure to pay wages in period after union was certified but no collective bargaining agreement was in effect), Bookbinder's Seafood House, Inc., 340 NLRB 930, 930-31 (2003) (failure to pay wages after collective bargaining agreement expired), and Administrative Servs. of America, Inc., 312 NLRB No. 110, slip op. at 1-2 (1993) (failure to pay wages for five days after collective bargaining agreement expired), enforced, 25 F.3d 1049 (6th Cir. 1994) (table; unpublished opinion at 1993 WL 393863). See also Cobb Theatres, Inc., 260 NLRB 856, 860 (1982) (employer violated Section 8(a)(1) and (5) by failing to make pension fund contributions and making other unilateral changes relating to wages), enforced, 711 F.2d 1057 (6th Cir. 1983) (table).

[22]By definition, a company must be an employer to be a successor employer.

promotes the statutory policy of avoiding, or at least minimizing, industrial strife to facilitate the flow of commerce." Golden Cross Care II, Inc., d/b/a Golden Cross Health Care of Fresno, 314 NLRB 1201, 1205 (1994) (citing NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272 (1972)).

"Any 'assertion that "there cannot be successorship without ownership" is contrary to the law,' inasmuch as an acquiring 'employer may be subject to successorship obligations despite the fact that there has been no transfer of title to the assets.'" Golden Cross, 314 NLRB at 1205 (quoting East Belden Corp., 239 NLRB 776, 791 (1978), enf'd, 634 F.2d 635 (9th Cir. 1980) (table)). As the ALJ explained in Sprain Brook Manor Rehab, LLC, 365 NLRB No. 45 (2017):

> An employer in a business takeover need not have acquired title to the assets of the business before he may be treated in law as the successor for collective-bargaining purposes. *East Belden Corp.*, 239 NLRB 776, 791 (1978); *Sorrento Hotel*, 266 NLRB 350, 356-57 (1983), and authorities cited. Rather, where a prospective buyer steps into the management of a union-represented business pending a conclusion of the sale of assets and does not then substantially alter the composition or appropriateness of the bargaining unit, he will be treated as a successor fitting within the "perfectly clear" exception suggested in Burns as triggering a duty to recognize and bargain with the incumbent union before making any subsequent changes affecting employment in the bargaining unit. [footnote omitted] *Sorrento Hotel*, supra at fn. 23.
>
> The operative language as to when a buyer's successor obligation attached is when it commenced with the management and control of the business operations. *East Belden*, above. [footnote omitted]

Id., slip op. at 33.

The Board applies these principles even when a company operates a business during a transition period when the company's right to operate the business permanently remains subject to a contingency, sometimes involving government or another third-party's approval. See, e.g., Golden Cross, 314 NLRB at 1202, 1203, 1209 (purchaser of nursing home found to be employer although sale remained contingent upon purchaser acquiring a license from State Department of Health Services to operate the facility); Michael J. Malone and Bob Burkheimer d/b/a Sorrento Hotel, 266 NLRB 350, 352, 356-57 (1983) (Respondent found to be employer when it managed hostelry while negotiating a long-term lease agreement authorizing Respondent to operate the business); East Belden Corp., 239 NLRB 776, 791-92 (1978), enf'd, 634 F.2d 635 (9th Cir. 1980) (table) (Respondent found to be employer when it operated business during escrow period when deal to purchase business might fall through; "[E]ven though an employer may only be operating a business temporarily it does not privilege the employer to ignore the provisions of Section 8(a)(5) of the Act.").

In this case, Respondents stated repeatedly in 2016 that there was no transition period and no condition upon which the transfer of ownership of the MTA Contract away from TransCare NY depended. Respondents took over the paratransit business immediately upon foreclosing on the MTA Contract. See, e.g., CP Ex. 1 at 3 ("WHEREAS, PPAS and Lenders maintain and assert that the Strict

Foreclosure was properly conducted in accordance with applicable law, title in the Foreclosed Personal Property Assets passed by operation of law immediately") (emphasis supplied); see generally Point II. To the extent Respondents' ability to operate the paratransit business long-term remained subject to their customer's (i.e., the MTA's) approval, this indirectly affected the length, not the existence, of the employment relationship between Respondents and the employees.

In any event, whether Respondents obtained legal title or became a party to the MTA Contract does not change that Respondents operated the paratransit business and became the employer of the employees in issue.

C. The Trustee did not permanently refuse to release the server and, if he had, it would not have voided the foreclosure or stopped Respondents from performing the paratransit services.

The ALJ also incorrectly concluded that the foreclosure sale of TransCare NY assets never "went through," and that Transcendence II did not operate, because the Trustee would not release a computer server Transcendence II purportedly needed to operate. See ALJD at 6:30-31; id. at 14:38-46.

As with the MTA Contract, assuming that TransCare NY and the Trustee did not deliver the server and that it was a foreclosed asset, TransCare NY may have breached the foreclosure agreement and subjected itself to damages, but this would not void the foreclosure agreement. In any event, Respondents must have had the access to the server that they required, legitimately or not, because Respondents

operated between February 24 and 26, as discussed in Point II. Moreover, there was only a temporary question about the server, not an outright refusal to deliver it.

The ALJ stated that the Trustee would not release the server to Youngblood or any other official of TransCare. See id. at 14:41-43. We assume that the ALJ meant to an official of Transcendence II.[23] In any event, the ALJ also mischaracterized the pertinent events.

According to an email that Youngblood sent at 3:26 a.m. on February 26, Patriarch tasked him with relocating the server and other critical hardware and software after hours on February 25, the first full day of the bankruptcy. Youngblood sought to confirm the appropriateness of this action with Gary Herbst, one of the Trustee's lawyers. Herbst advised him that it would not be appropriate to relocate the server until the Trustee was able to determine a cause of action. Herbst further advised that he and the Trustee would be at the Debtor's premises in the morning to work out issues facing the company. Youngblood was not comfortable relocating the server and concluded that there are probably reasonable arguments on both sides. Youngblood also states that they "did not actually execute for logistical reasons." See Respondents Ex. 1.

[23]Youngblood signed the Bill of Sale for Transcendence as its President. See GC Ex. 12 at 5. The ALJ stated that Youngblood said that Tilton offered him the position of President of one of the two Transcendence companies. See ALJD at 6:14-15. In fact, Youngblood testified based on documents shown to him that he was President of both Transcendence companies. See Tr. 175 (Youngblood).

According to the ALJ, the Trustee said that the server was deemed a valuable asset for bankruptcy purposes. See ALJD at 14:42-43. The Trustee testified that he did not know at the time if Respondents foreclosed on the server and if there was property of the bankruptcy estate on the server. See Tr. 469, 481 (LaMonica). The Trustee, on his first full day working on the bankruptcy, may well have required some time to investigate before allowing Respondents to take possession of this valuable asset. Herbst explained to Youngblood in the evening on February 25 that the issue might be addressed the following morning. Thus, the Trustee's position was reasonable, especially in contrast to the "mission" Respondents apparently assigned Youngblood to take possession of critical equipment without obtaining the Trustee's consent. See Respondents Ex. 1.

In any event, the Trustee apparently did not impede Respondents' access to necessary information because the paratransit operations continued until the afternoon on February 26, when Respondents terminated them after the MTA told Respondents that it would not move forward with Transcendence II.[24]

IV. THE ALJ ERRED BY CONCLUDING THAT NO RESPONDENTS ARE A SINGLE EMPLOYER.

As stated above, Local 1181 concurs in Counsel for the General Counsel's positions in this case, and respectfully refers the Board to the General Counsel's

[24]If Respondents were not operating, Respondents do not explain why they wanted to relocate the server so expeditiously and surreptitiously.

brief for the arguments on the single employer issue. Rather than cover this subject in similar detail, Local 1181 addresses only select points herein.

The ALJ expressed concern that the single and joint employer doctrines should not be applied in a manner that applies to too many private investment and management funds based on the way they structure their relationships with their companies. See ALJD at 23:19-23; id. at 22:1-16; id. at 24 n.17. But the ALJ gave insufficient consideration to the need to prevent the use of corporate form, as Respondents did here, in a manner that frustrates the purposes of the Act.

The ALJ did not absolve Respondents of wrongdoing. The ALJ stated that "TransCare's operations of the para-transit business after the filing of the bankruptcy petition may have violated bankruptcy laws since it should have ceased all operations on the eve of February 24 (as testified by LaMonica)." Id. at 17 n.13. Respondents knew to cease operations that were part of the bankruptcy. The NewCo Announcement explains that other TransCare operations were ceasing immediately and responsibility for them transferred to the court-appointed Trustee. See GC Exs. 2, 23. Tilton and Respondents caused the paratransit operations to continue using the same equipment and employees after Tilton caused TransCare NY to file for bankruptcy, for example by inducing employees to continue working. Respondents also told the Trustee that he was not responsible for the paratransit operations, thereby causing him to refrain from shutting them down.

The ALJ would say that Tilton exercised her authority with TransCare NY and that Respondents were assisting her in that capacity in causing a violation of bankruptcy law. But Tilton and Respondents did not continue the paratransit operations to benefit TransCare NY, they did so to benefit Tilton and Respondents. The failure to pay the employees for their work on February 24, 25, and 26, and to bargain with the Union also violated Section 8(a)(5) and (1) of the Act. The ALJ did not hold Respondents liable for the violation of Board law they caused. Tilton's multiple positions allow Respondents to conduct themselves as a single integrated enterprise that acts first and decides later on which company's behalf its agents acted depending on what is then in Tilton's financial interest. Knowing this, the ALJ should have considered in whose interests Respondents acted and concluded that Respondents are a single employer.

Many facts that relate to whether Respondents should be found to be a single employer are discussed above. For example: (1) Tilton and Patriarch created Transcendence II to continue the paratransit operations; (2) Tilton, PPAS, and Patriarch caused the foreclosure of the MTA Contract and other TransCare NY assets and the transfer of those assets to Transcendence II; (3) Tilton and Respondents made statements or caused statements to be made to Local 1181 and the employees that induced the employees to continue to perform the work as employees of Transcendence II; (4) Tilton, PPAS, and Patriarch made statements

or caused statements to be made to the Trustee and the MTA that induced them to allow Transcendence II to continue the paratransit operations at least temporarily; and (5) Tilton and Respondents acted with the intent of persuading the MTA that Transcendence II should perform the paratransit operations permanently.

The Board should also consider the facts discussed herein.

Of particular note, contrary to the ALJ's conclusion, the foreclosure and the Bill of Sale were not an arms'-length transaction. See ALJD at 25:25-30; supra pp. 7-9; ALJD at 23:1 ("Single-employer status is also characterized by a lack of an arms-length relationship."); id. at 23:4-5 ("The Board has found that two nominally separate entities constitute a 'single employer' when there is an absence of an arms-length relationship between them.").

The ALJ acknowledged that the Respondents are under common ownership and financial control by Tilton, and that Patriarch provides financial and legal advice in the management of Tilton's portfolio companies. See id. at 23:11-12, 14. "Patriarch was intimately involved in setting up the bank accounts, insurance policies, workers' compensation, payroll, taxes, and other items needed to start-up Transcendence and Transcendence II." Id. at 22:1-3.

Tilton's plan required an "all hands on deck" effort at Patriarch toward the common objective of effectuating the transfer to the Transcendence companies of the former TransCare assets for the benefit of Tilton and Respondents, not

TransCare. There is no evidence that Tilton or the Patriarch employees gave any contemporaneous thought to on which company's behalf they were working. But once the foreclosure by PPAS was complete, TransCare had no interest in the further transfer of the assets by PPAS to the Transcendence companies. See ALJD at 15:45-47. Stephen testified that his communications with the MTA were on Transcendence's behalf, see Tr. 435 (Stephen), and that he believed it would be easier to have the MTA Contract assigned to Transcendence II if it was a going concern, see ALJD at 12:45-47. But Stephen also identified himself in the email to the MTA's attorney as an attorney with Patriarch, his signature block identifies him as "Senior Director, Legal" with Patriarch, and he sent the email from his PatriarchPartners.com email address. See GC Ex. 26 at 2-3.

Patriarch employees prepared the NewCo Announcements and other communications to the Transcendence II employees, which Tilton approved. A Patriarch employee directed Youngblood and Fuchs (who were selected to lead Transcendence and Transcendence II and were acting in the interests of those companies) to communicate the Announcements to the groups of employees under their respective charges. See supra p. 19 & n.10.

Respondents met financial exigencies of the Transcendence companies. PPAS paid their initial workers' compensation insurance premiums. See Tr. at 322-23. Respondents communicated Tilton's commitment to pay Transcendence

II employees who continue to work as scheduled certain back wages if the bankruptcy estate did not pay them. See supra pp. 14-15.

Tilton's plan included the decision that Transcendence II would hire all of TransCare NY's bargaining unit employees with no change in terms and conditions of their employment. See Tr. 273-74; GC Ex. 2. The ALJ erroneously concluded that Patriarch was acting on behalf of Tilton, as the owner of TransCare, by offering new employment at Transcendence II. See ALJD at 21:21-24. TransCare had no interest in who Transcendence II hired, how many of its former employees Transcendence II hired, or their terms and conditions of employment.

In sum, Respondents did not have an arms'-length relationship. Their actions were controlled by Tilton and Patriarch employees acting at her instruction and in her interest. Indeed, Respondents took no action that was inconsistent with Tilton's interests. Respondents' pertinent actions were not actions of TransCare NY or to benefit TransCare NY. Respondents acted as an integrated enterprise providing paratransit services after taking that work from TransCare NY. Respondents should now be held liable as a single employer for violating the Act.

V. THE ALJ ERRED BY EXCLUDING ADDITIONAL BANKRUPTCY PLEADINGS FROM THE RECORD, INCLUDING PROPOSED GENERAL COUNSEL EXHIBIT 31.

The ALJ erred by refusing to admit into evidence additional documents from the TransCare bankruptcy proceedings and related cases, including proposed

General Counsel Exhibit 31. That proposed Exhibit, included in the rejected exhibit file, was PPAS' response to a motion by the Trustee in the Bankruptcy Court. The proposed Exhibit is relevant because Creswell submitted it as PPAS' counsel and because it addressed the foreclosure and its validity. The ALJ also stated at the time that he would not admit more pleadings from the bankruptcy. See Tr. 356-57. The ALJ's ruling excluding this proposed exhibit was incorrect, as was his blanket exclusion of additional bankruptcy court documents.

CONCLUSION

For the foregoing reasons, Local 1181's Exceptions should be granted.

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Respectfully submitted,

By: /s/*Richard A. Brook*

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